Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the	)	MB Docket No. 13-236
Commission's Rules, National Television	)	
Multiple Ownership Rule	)	
	)	

COMMENTS OF MOUNTAIN LICENSES, L.P., BROADCASTING LICENSES, L.P., STAINLESS BROADCASTING, L.P. & BRISTLECONE BROADCASTING LLC

Mountain Licenses, L.P., Broadcasting Licenses, L.P., Stainless Broadcasting, L.P. and Bristlecone Broadcasting LLC (collectively "TV Licensees"),[1] by their attorneys, hereby support the November 23, 2016 Petition for Reconsideration (the "PFR") of ION Media Networks, Inc. ("ION") and Trinity Christian Center of Santa Ana, Inc. ("Trinity").[2] The PFR seeks reconsideration on several grounds of the Commission's September 7, 2016 Report and Order in MB Docket No. 13-236,[3] which eliminated the so-called "UHF Discount" long utilized by the FCC in calculating television station viewership levels for purposes of application of the national audience reach cap.[4]

[1] TV Licensees are licensed to operate full and/or low power television broadcast stations in various communities in the states of New York, Washington, Oregon, Idaho, and California.

[2] Petition for Reconsideration of ION Media Networks And Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236 (filed Nov. 23, 2016).

[3] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule,* MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213 (2016) ("R&O").

[4] Under the regulations in place prior to the R&O, ownership of a UHF station in a Nielsen Designated Market Area ("DMA") resulted in only 50% of the viewing households in that DMA counting against the national cap, currently set at 39% of all such households nationwide (the "National Cap").

The PFR makes a compelling case that the R&O erred in two critically important respects. First, the R&O failed even to acknowledge, much less address, the close and direct linkage between the UHF Discount and the National Cap. As a result, elimination of the UHF Discount without any consideration of elimination or upward adjustment in the National Cap threatens to visit draconian consequences on the TV industry moving forward, improvidently throttling the future development of robust and innovative national programming networks owned by station licensees, like those developed by ION, Univision, and Trinity with the UHF Discount in place. Second, the R&O refused to permit existing TV station owners otherwise granted grandfathered status to sell intact their owned-station complements to new owners. This approach inequitably prevents affected companies from realizing the benefit of all the effort they have put into creating their networks, in reliance on longstanding FCC rules. Collateral loss to the viewing public of the value of those networks consequently looms large. Neither of these challenged aspects of the R&O makes public policy sense, and the reconsideration sought by ION and Trinity is amply justified.

TV Licensees note that the R&O itself, however unwittingly, makes a strong case against its own piecemeal consideration of the UHF Discount apart from the National Cap. That is, the R&O recites multiple times that the basis for elimination of the UHF Discount is changed circumstances since 1985, particularly improvements, on the other side of the June 12, 2009 digital transition divide, in the technical performance of UHF television stations (signal propagation, etc.) vis-à-vis VHF stations. But dramatic changes have *also* occurred since 1985 in the overall competitive landscape in which broadcast television station owners operate, and these changes directly undermine the rationale for continued imposition of the National Cap. To name just a few relevant 1985 realities that have long since been eclipsed by the press of

technological development: In 1985, the Internet was essentially still a gleam in the eye of the technical cognoscenti, direct broadcast television satellite competition had not yet launched into geostationary orbit, and the nascent cable television industry was dominated by just a few still relatively novel programming options like HBO and ESPN. The competition that TV broadcasters face today is worlds apart from that which existed 30 years ago.

The R&O effectively concedes that, given such industry evolution, the Commission has long been under judicial admonition to revisit and update the National Cap.[5] Similarly, the R&O cites the bedrock principle articulated in *Becthtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 816 (1992), that "where the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach."[6] And, the R&O expressly relies on the following to support the UHF Discount's repeal: "[T]hree decades ago roughly 60 percent of U.S. television households received programming exclusively over-the-air, while according to the most recent Nielsen data, approximately 11.5 percent, or about 13.3 million television households, were broadcast-only."[7] To the extent these facts and legal principles apply to the UHF Discount, they apply equally to the National Cap. Given the clear dictates of governing precedent, the R&O's election to "cherry pick" the UHF Discount for elimination while leaving the National Cap on the books constitutes unsound and unwise agency action.

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[5] *See* R&O, 31 FCC Rcd at 10216, n.22 (citing the finding in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) that the FCC's decision (as part of its 1998 Biennial Review) to retain a national audience reach cap was arbitrary and capricious.)

[6] *Id.* at 10223, n.80.

[7] *Id.* at 10226, ¶ 29.

TV Licensees also note that the R&O drew well-reasoned, separate dissents from Commissioners Pai and O'Rielly. Each Commissioner came at the R&O's substantial drawbacks from different angles, and both dissents should now inform the FCC's reconsideration.

Commissioner Pai focused on the two issues which lie at the heart of the PFR, and came down on the side of ION and Trinity on both. He expressed deep concern that the FCC was pulling the UHF Discount thread from the tapestry of the multiple ownership rules without any evaluation of the multiple ownership rules in general or of the more granular impact the UHF Discount repeal would have on the National Cap – i.e., eliminating the UHF Discount makes the National Cap squeeze broadcasters much more tightly. Commissioner Pai also identified an unfortunate parallel between the manner in which the R&O eliminates the UHF Discount and the FCC's relatively recent misadventure in joint sales agreement ("JSA") attribution.[8]

Commissioner O'Rielly underscored a different position, borne of his personal experience on Capitol Hill, that only Congress can change the UHF Discount or the inextricably intertwined National Cap. He went on to point out that, in any event, the UHF Discount repeal is myopic just as the JSA attribution decision was – the FCC's elimination of the discount improperly "tinker[s] with a calculation methodology without any consideration of the current validity [of]the overall rule it modifies."[9]

For all the reasons set forth above and in the PFR, TV Licensees urge the Commission to rectify the R&O's clear errors, as articulated in the PFR.

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[8] *See id.* at 10247, Dissenting Statement of Comm'r Ajit Pai.

[9] *Id.* at 10251, Dissenting Statement of Comm'r Michael O'Rielly.

Respectfully submitted,

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January 10, 2017

CERTIFICATE OF SERVICE

I, Jessica Gyllstrom, hereby certify that on this 10th day of January, 2017, I caused a copy of the foregoing Comments to be served via U.S. Mail on the following:

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